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IN THE SUPREME COURT OF FLORIDA

MICCOSUKEE VILLAGE SHOPPING CENTER, et al.,

Petitioner,

vs. CASE NO. 82,175

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

Respondent.

ANSWER BRIEF ON THE MERITS OF RESPONDENT STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

THE STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, the defendant below and respondent here, will be referred to as the "DEPARTMENT". The MICCOSUKEE VILLAGE SHOPPING CENTER, one of the plaintiffs below and petitioner here, will be referred to as the "CENTER".

Citations to the Appendix to this Answer Brief will be indicated as (RA) followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The DEPARTMENT substantially agrees with the Statement of the Case and Facts presented by the CENTER as it generally relates the procedural history and facts. However, the DEPARTMENT would specifically point out that many of the statements made by the CENTER are argument and are impermissibly included in the Statement of the Case and Facts and should be stricken.

SUMMARY OF ARGUMENT

The Legislature enacted the map of reservation statute as a planning tool and numerous maps were filed pursuant to the presumptively valid statute. This Court found the statute facially unconstitutional for failing to substantially advance a legitimate state interest. Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990).("Joint Ventures II") All maps in the state were invalidated by the decision.

Some of the district courts of appeal initially construed this Court's decision in Joint Ventures II as establishing a per se "taking" rule for all maps of reservation. To the contrary, no case in regulatory takings jurisprudence (including Joint Ventures II) has adopted a per se rule of compensation for cases where the regulation is stricken for failing to substantially advance a legitimate state interest. A per se approach is only applied in cases of a physical invasion or denial of all economically viable use. The first of such decisions was Orlando/Orange County Expressway Authority v. W & F Agrigrowth, 582 So. 2d 790 (Fla. 5th DCA 1991). Recognizing that it had overshot the mark in its attempt to fashion a remedy for unconstitutional maps of reservation it was not long before the Fifth District Court of Appeal receded from its "unfortunate opinion" in Agrigrowth. Department of Transportation v. Joseph Weisenfeld, 617 So. 2d 1071, 1073-1074 (Fla. 5th DCA 1993). Unfortunately, Agrigrowth had condoned a per se rule of law equating the mere filing of a map of reservation with a "temporary taking" of any property covered by that map. In other words, Agrigrowth and its unfortunate

followers were holding the filing of a map of reservation to be synonymous with "taking of property." As a result property owners were awarded damages without ever having had to prove there was a taking.

Those days are over. Property owners in districts other than the second must once again meet their burden of proof and present sufficient evidence to sustain a factual determination that they suffered a substantial deprivation of the use of their property before a taking will be found. Weisenfeld, 617 So. 2d 1071. Through its opinion in Weisenfeld the fifth district commendably corrected the mistakes it made in Agrigrowth. In this case, the first district has aligned itself with the fifth district's opinion in Weisenfeld and has agreed that a genuine issue of material fact exists on whether a taking of the CENTER's property occurred, thereby rejecting a per se taking rule and requiring proof of a taking.[1] Having done so, the first district like the fifth found its opinion in conflict with Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So. 2d 52 (Fla. 2d DCA 1992), which was heard by this Court on October 8, 1993.

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[1] Since Weisenfeld had not been decided at the time the district court rendered its original opinion, the court did not have the benefit of the fifth district's better reasoned opinion therein and its recognition that Agrigrowth was an "unfortunate opinion in several respects". Weisenfeld, 617 So. 2d at 1074. On rehearing the district court withdrew its original opinion and rendered an opinion following Weisenfeld. (P.A. 1-3)

ARGUMENT

THE DISTRICT COURT OF APPEAL PROPERLY DETERMINED THAT ALL LANDOWNERS WITH PROPERTY INSIDE THE BOUNDARIES OF INVALIDATED MAPS OF RESERVATION UNDER SUBSECTIONS 337.241(2) AND (3), FLORIDA STATUTES (1987), ARE NOT ENTITLED TO RECEIVE PER SE DECLARATIONS OF "TAKING" AND JURY TRIALS TO DETERMINE JUST COMPENSATION.

I. INTRODUCTION.

In the early 1980's, the Florida Legislature provided the DEPARTMENT with a planning tool for future highway construction by enacting the map of reservation statute codified at §337.241, Fla. Stat. (1985). The statute allowed the DEPARTMENT to file a map in the public records that delineated future transportation corridors. Upon the filing of a map, local governments were prohibited from issuing development orders for construction within the boundaries of the designated corridor for a period of five years. §337.241(2), Fla. Stat. (1985). The map was effective for five years, unless withdrawn. The statute made provision for an administrative challenge and certain exceptions. §337.241(2)(3), Fla. Stat. (1985). Even in its earliest form, the map of reservation statute provided for two exemptions from its restrictions: renovations of existing commercial structures of less than 20% of the appraised value of the structure and renovation or improvement of existing residential structures as long as used as private residences. §337.241(2), Fla. Stat. (1985).

In 1985, the legislature amended the map of reservation statute to allow expressway authorities created under Chapter 348 to file maps of reservation. Chapter 85-149, §2, Laws of Florida. After numerous maps were filed by both the DEPARTMENT and the expressway authorities pursuant to the statute, this Court addressed the constitutionality of the statute in Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990). ("Joint Ventures II")

Finding that the map of reservation statute constituted an unconstitutional exercise of the state's police power "with a mind toward property acquisition," the Court stated:

> We do not question the reasonableness of the state's goal to facilitate the general welfare. Rather we are concerned here with the means by which the legislature attempts to achieve that goal. Here, the means are not consistent with the constitution.

Id. at 626. Thus, Joint Ventures II had the effect of voiding all maps of reservation filed in the State of Florida as of July 27, 1990, the date this Court's opinion became final.[2] Significantly, since the case did "not deal with a claim for compensation, but with a constitutional challenge to a statutory mechanism," the opinion does not address the issue of entitlement. Id. at 625.

Joint Ventures II, has been relied upon by numerous property owners in convincing trial courts to grant summary judgment on the

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[2] The legislature has repealed the map of reservation statute. Chapter 92-152, §108, Laws of Florida.

issue of entitlement to compensation in inverse condemnation actions. The first appellate case addressing an inverse condemnation compensation claim based on Joint Ventures II, was Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 5th DCA 1991). Although the Fifth District Court of Appeal subsequently receded from that opinion as being "unfortunate in several respects" it did not do so before other trial courts and districts improvidently relied upon it. See Seminole County Expressway Authority v. Bullet, 595 So. 2d 105 (Fla. 5th DCA 1992)(trial court's granting of summary judgment for a "taking" of residential property was affirmed); Tampa/Hillsborough County Expressway Authority v. A.G.W.S. Corp., 608 So. 2d 52 (Fla. 2d DCA 1992).

As recognized in Weisenfeld this Court's ruling in Joint Ventures II does not entitle property owners to an automatic finding that a "taking" of their property occurred during the effective dates of the map of reservation without any further inquiry or to a jury trial to determine damages, whether substantial or nominal. Presently, only the second district continues to interpret Joint Ventures II in a manner that not only violates the express holding of Joint Ventures II but is wholly unsupported by regulatory takings caselaw from any state or federal jurisdiction. No court, including this Court and the United States Supreme Court, has adopted a per se entitlement to compensation for regulations invalidated for failing to substantially advance a legitimate state interest. This Court left no doubt that "[a] use restriction which fails to substantially advance a legitimate state

interest may result in a "taking." Joint Ventures II, 563 So. 2d at 625, n. 9. (emphasis supplied) The United States Supreme Court has said the same thing: "...[a] use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose...." Penn Central Transportation Co. v. City of New York, 438 U.S. 108, 127, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (emphasis supplied). This Court should affirm the decision in this case by upholding the fifth district opinion in Weisenfeld and quashing the opinion of the second district in A.G.W.S..

II. WINDFALL RECOVERIES ARE AVOIDED WHEN COMPENSATION IS AWARDED ONLY WHEN SUFFICIENT FACTS ARE ESTABLISHED THAT THERE HAS BEEN A DEPRIVATION OF SUBSTANTIAL ECONOMIC USE.

The number of cases pending before this Court and in the various circuits substantiates the DEPARTMENT's position that property owners are expecting "taking" damages by merely claiming that a map of reservation has been filed on their property. There is simply no reason and none has been advanced by the CENTER why the standard already adopted by the courts that no judicial determination of a "taking" be made until the property owner has proven denial of a substantial economic use of the property is inappropriate.

Because of the fifth district's "unfortunate" opinion in Agrigrowth even in situations where a map crossed a small portion of a landowner's property (even one foot) for a short period of time (only two days) a "taking" is irrebuttably presumed for

purposes of inverse condemnation. However, the legal definition of a "taking" has clearly not been met. Nevertheless, in such instances the plaintiffs in such lawsuits are entitled to payment of all attorney's fees and all costs associated with the litigation regardless of actual damages (if any) proven.

Judge Altenbernd, in his well-reasoned dissent in Agrigrowth implied that the majority's ruling amounted to a full employment act for attorneys. It is widely known that attorney's fees in eminent domain cases are among the highest in the state regardless of the results obtained. It is not unusual for attorney's fees in these cases to exceed the damages to the landowner's property. Consequently, the incentive to file a claim even where minimal damage may have been incurred is almost irresistible under the Agrigrowth rule. Not long after Judge Altenbernd's dissent in Agrigrowth, the fifth district sitting en banc agreed with him and adopted the standard enunciated by this Court in Joint Ventures. Joint Ventures, 563 So. 2d at 625. It is respectfully submitted that the standard already established by this Court (and numerous other courts) compensates those who have suffered actual adverse economic impact and does not waste judicial resources on the nominal damages claims that may be brought but would be truncated by the procedural safeguards suggested by the CENTER.[3]

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[3] The CENTER suggests the use of directed verdict against a claim for compensation. (Initial Brief p. 14). Surely there can be no viability to a motion of directed verdict when the circuit courts of this state have been entering summary judgment on the issue of liability even before the governmental entity is provided the opportunity of filing an answer. The success of a motion for directed verdict on the amount of compensation is doubtful when the trial court has already determined that the property owner is

III. ENTITLEMENT MUST BE PROVEN BEFORE COMPENSATION CAN BE AWARDED

A. NO COURT HAS EVER AWARDED COMPENSATION UNDER A PER SE RULE SIMPLY BECAUSE THE REGULATION FAILS TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST.

Time after time the courts of this nation have found a regulation failed to advance a legitimate state interest yet refused to award compensation. See, e.g., Nollan v. California Costal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L. Ed. 2d 677 (1987). Like this Court in Joint Ventures II, the Nollan court found that the regulation challenged had the purpose of "avoidance of the compensation requirement rather than the stated police power objective." Nollan, 483 U.S. at 841. Finding that the regulation did not advance a legitimate state interest, the United States Supreme Court struck the regulation and ruled that if the government wanted the property interest "it must pay for it." Id. at 842. No compensation was awarded the Nollans. Id.

Every property owner with restrictions similar to the one in Nollan that has sought compensation has been similarly unsuccessful for various reasons. California Costal Commission v. Superior Court, 210 Cal.App.3d 1488, 258 Cal. Rptr. 567 (Cal.Ct.App. 1989)(barred by res judicata); Antoine v. California Costal Commission, 8 Cal.App. 4th 641, 10 Cal. Rptr.2d 471 (Cal.Ct.App. 1992)(condition permissible if sea wall encroaches on public land). See also Patrick Media Group, Inc. v. California Costal Commission,

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entitled to some compensation, even if nominal.

Cal. App.4th 592, 11 Cal. Rptr.2d 824 (Cal.Ct.App. 1992) (inverse condemnation action for compelled removal of billboards barred by res judicata).

The United States Supreme Court has adopted a per se entitlement to compensation only when there is a physical invasion of the property or when the property owner has been denied all beneficial use of the property. Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 S.Ct. 286, 120 L. Ed. 2d 798, 814 (1992). Every other case is decided on a case by case basis: "In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in...essentially ad hoc, factual inquires....'" Id. at 812.[4]

The regulatory takings jurisprudence of the federal circuit encompassing Florida is consistent with the holding of this Court and the United States Supreme Court. "If the regulation does not substantially advance a legitimate state interest, it can be declared invalid." Reahard v. Lee County, 968 F. 2d 1131, 1135 (11th Cir. 1992). A just compensation claim does not seek invalidation of the regulation, but seeks monetary compensation. Id. "Just compensation claims admit and assume that the subject regulation substantially advances a legitimate state interest...the only issue...is whether an owner has been denied all or

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[4] In a case subsequent to Agrigrowth, the Fifth District Court of Appeal correctly cited to this standard. Vatalaro v. Department of Environmental Regulation, 601 So. 2d 1223, 1228 (Fla. 5th DCA 1992) ("The inquiry into whether a taking has occurred is done on a case by case basis.")

substantially all economically viable use of its property." Id. at 1136. In resolving the issue of whether the property owner has been denied all or substantially all economically viable use, "the fact finder must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations." Id.

Clearly a facial challenge to a regulation as an invalid exercise of the police power has as its remedy the striking down of the regulation and nothing more. Eide v. Sarasota County, 908 F. 2d 716, 721-722 (11th Cir. 1990), cert denied 112 L. Ed. 2d 1179 (1991). Two reasons have been advanced for the rule of law that successful facial challenges to a regulation as an invalid exercise of the police power results in invalidation of the regulation rather than compensation. First, compensation claims admit and assume that the regulation is valid. Reahard, 968 F. 2d at 1136. Second, a facial challenge to a regulation as an invalid exercise of the police power has a broader benefit to the society rather than to a particular property owner:

> Consistent with the view that facial challenges are allowed primarily for the benefit of society, rather than for the benefit of the litigant, a victory by the plaintiff in such cases normally results in an injunction or a declaratory judgment, which serves the broad societal purpose of striking an unconstitutional statute from the books.

Weissman v. Fruchtman, 700 F. Supp. 746, 753 (S.D.N.Y. 1988). The broad societal purpose is borne out by the remedy awarded by this Court in Joint Ventures II. Once the map of reservation statute

was determined to be an invalid exercise of the police power, the statute was declared unconstitutional and was invalidated. Every property owner affected by a map of reservation was freed from any restrictions imposed by the invalidated maps of reservation. If the property owner wants compensation for the effect of the invalidated map on his property, the question of whether any particular property owner is entitled to compensation for the period the maps were in effect should be decided on a case by case basis by inquiring into the extent of deprivation of economic use. Joint Ventures II, 563 So. 2d at 625; Reahard, 968 F. 2d at 1136.

These cases are in a similar posture to the case of Moore v. City of Costa Mesa, 886 F. 2d 260 (9th Cir. 1989), cert. denied 496 U.S. 906, 110 S. Ct. 2588, 110 L. Ed. 2d 269 (1990). In Moore, the California courts had declared invalid a conditional variance that required part of Moore's property be deeded to the City of Costa Mesa. Id. at 261. Moore sued claiming that he was entitled to compensation for the partial temporary taking caused by the previously invalidated conditional variance. The district court's dismissal with prejudice of Moore's complaint for failure to state a claim was upheld on appeal. The court held that Moore must allege and prove that he was denied all use of his property prior to being awarded compensation. Id. at 263. The allegations of the complaint were simply "insufficient to state a claim for unconstitutional regulatory taking for which compensation is due, and there is no case law that supports his position." Id. at 264.

A similar claim was rejected in the California state courts in Ellison v. County of Ventura, 217 Cal. App. 3d 455, 463, 265 Cal.

Rptr. 795 (Cal.Ct.App. 1990). In Ellison, the court rejected a landowner's argument that if he proves the regulation fails to substantially advance a legitimate state interest he is entitled to compensation. The court ruled "that in order to show the government has taken private property by a regulation which does not substantially advance a legitimate state interest, the landowner must show more than the invalidity of the government's action. The landowner must also show that something of value was taken." Id. The court rejected Ellison's claim for compensation, noting that Ellison conceded that the regulation had not deprived him of all beneficial uses of the property. Id. at 797.

B. AGINS COMMANDS A SIMILAR RESULT.

The CENTER's reliance on Agins for the proposition that a declaration of the unconstitutionality of a statute for failure to advance a legitimate state interest ipso facto entitles an aggrieved party to compensation is misplaced. In Agins the owner of a five acre parcel of unimproved land asked the court to declare zoning ordinances limiting its development to between one and five single-family residences were unconstitutional and constituted a taking in inverse condemnation. Agins v. City of Tiburon, 447 U. S. 225, 257-258, 65 L. Ed. 2d 106, 110 (1980). In sustaining the city's demurrer that the complaint failed to state a cause of action, the California Supreme Court held:

> A landowner who challenges the constitutionality of a zoning ordinance may not 'sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain.' (citation omitted) The sole remedies for such a taking, are mandamus and declaratory judgment...[and the ordinance at issue have] not deprived the appellants of their property in that compensation in violation of the Fifth Amendment.

Id. at 259, 65 L. Ed. 2d at 111. Citing to Nectow v. Cambridge, the Agins court went on to say that "[t]he application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests". Id. at 260. However, the complaint in Nectow was for a mandatory injunction directing the city to grant Nectow's permit to build without regard to the restrictions of the ordinance. Nectow v. Cambridge, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed 842

(1928). Moreover, although the court agreed with the finding of the master below that the districting of Nectow's land as a residential district did not promote the health, safety, convenience and general welfare of the city, it did not find a taking had occurred nor did it award compensation. Id. at 186-189. Thus, Agins and Nectow and the cases cited therein fail to support the CENTER's theory that a taking occurs when a regulatory provision fails to advance a legitimate state interest.

IV. COMPENSATION IS DUE ONLY TO THOSE PROPERTY OWNERS WHO PROVE DEPRIVATION OF SUBSTANTIAL ECONOMIC USE OF THE PROPERTY.

Contrary to the tenure and implication of the CENTER's Initial Brief, the DEPARTMENT does not suggest that invalidation is the only remedy available to every property owner affected by a map of reservation. The DEPARTMENT's position is that compensation is not due every property owner affected by a map of reservation. Rather, compensation is only due those property owners who meet the traditional test of a compensable taking: when the regulation deprives the owner of substantial economic use of his/her property. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 413 (1922). An "as applied" analysis will provide compensation to those whose property was taken in the traditional sense of the word. The cases relied upon by the CENTER to the contrary simply do not support its position. For example, the

CENTER quotes extensively from the United States Supreme Court's opinion in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304 (1987). In First English the property owner argued (and the United States Supreme Court assumed for purposes of the opinion) that the regulation deprived the property owner of all beneficial use of the property. Id. at 321-322.[5] Upon remand, the lower court determined that no "taking" had occurred and no compensation was required. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 211 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (Cal. App. 2d Dist. 1989). The DEPARTMENT seeks nothing more; it simply asks that this Court reaffirm the long standing procedure that only those land owners who prove their property was actually "taken" in the traditional sense of the word are entitled to compensation. See Nollan, 483 U.S. at 841 (regulation struck as not advancing a legitimate state interest; no compensation awarded).

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[5] This Court recognized the crucial limitation in the court's holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by government can relieve it of the duty to provide compensation for the period during which the taking was effective" in Joint Ventures II. Joint Ventures, 563 So. 2d at 627, n. 11. Thus, this Court reasoned "First English offers no guidance to our resolution of the constitutional challenge" to the statute. Id.

V. POLICY CONSIDERATIONS SUPPORT COMPENSATION BE AWARDED ONLY UPON PROOF OF DEPRIVATION OF SUBSTANTIAL ECONOMIC USE OF THE PROPERTY.

A. THERE IS NO PROOF THAT THE CENTER MUST BEAR A PUBLIC BURDEN.

The CENTER asks this Court to believe that it must be compensated because he has been "asked to assume more than a fair share of the public burden." (Initial Brief p. 17 quoting San Diego Gas & Electric Co. v. City of San Diego, 101 S. Ct. 1287, 1306 (1981)). The CENTER bears no such burden and its position is without basis in law or fact. Without explaining how its situation is analogous to the cases cited, the CENTER simply reiterates out of context phrases and half sentences and claims they support its position. They do not. If, in fact, the CENTER has had to bear some unnatural burden by the imposition of the map of reservation, all it has to do is prove it. If it can be proven there has been a deprivation of substantial economic use of its property the CENTER will then be entitled to prove damages. By asserting error in the district court's decision the CENTER wants to avoid having to prove entitlement and asks to go directly to the issue of damages. The cases relied upon simply do not support that position.

B. A TAKING MUST BE PROVEN.

It goes without saying that the United States and Florida Constitutions require payment of just compensation when a taking has occurred. However, neither the constitutions nor the cases cited by the CENTER require compensation be paid without proof that there has been a taking in the traditional meaning of the word. The protection afforded in our constitutions are even handed, "[d]ue process required that no one shall be personally bound until he has had his 'day in court'". Scholastic Systems, Inc. v. LeLoup, 307 So. 2d 166, 169 (Fla. 1974). It is not only the CENTER that is entitled to its day in court. The CENTER asks this Court to enforce its constitutional rights and deny those same rights to the DEPARTMENT by denying the DEPARTMENT's access to the courts enjoyed by every other litigant in Florida to defend itself. The DEPARTMENT will not have its day in court if a per se rule is adopted by this Court. If a landowner has truly been deprived of substantial economic benefit by a map of reservation, then he/she should be fully compensated for the loss. However, the DEPARTMENT would be precluded from defending itself against such claims if a per se rule is established.

C. ONLY THOSE WHO WOULD PURSUE SPURIOUS CLAIMS WILL BE DISCOURAGED IF A TAKING MUST BE PROVEN.

The CENTER claims if the remedy for a declaration that a statute is unconstitutional is its striking then government will merely enact another unconstitutional regulation to take its place. The only support offered for this proposition is the rhetoric of commentators Berger and Kenner. (Initial Brief p. 17) The map of reservation statute was not declared unconstitutional until 1990 when the first district concluded that the challenged subsections were constitutional because the land owner had a remedy by way of an action for inverse condemnation. Joint Ventures II, 563 So. 2d at 624. No regulation has replaced it notwithstanding the CENTER claims that government can somehow keep enacting unconstitutional statutes merely to deprive property owners of their just compensation. The CENTER goes on to say that without the option of monetary compensation there will be "disincentive to unconstitutional conduct". (Initial Brief p. 17) This implies bad faith not only on the part of the government for lobbying for such legislation but also of the entire legislature if it were to continue to enact so-called unconstitutional legislation. Our system of checks and balances would simply not allow such bad faith attempts to enact unconstitutional legislation. Clearly, the DEPARTMENT has not acted impermissibly in this case.

The CENTER directs this Court to the government's action of continuing to file maps of reservation after Joint Ventures I to support its claim that the government will do anything it can to

keep from paying property owners and to continue to harass them using invalid regulations. (Initial Brief p. 17)

A clear reading of Joint Ventures II reveals that the CENTER's statements are disingenuous, misleading, and plain wrong. First of all, the first district did not find the statute constitutional - it found to the contrary. Joint Ventures, Inc. V. Department of Transportation, 519 So. 2d 1069 (Fla. 1st DCA 1988). During the pendency of the appeal, the DOT condemned the land and the parties entered into a monetary settlement. Nevertheless, the "district court decided that the great public importance and the likely recurrence of the issues preserved its jurisdiction despite the settlement." Joint Ventures II, 563 So. 2d at 624, n. 5. Thus, there is no basis for the CENTER's claim that during the pendency of the appeal from the first district the DEPARTMENT continued to file maps under an unconstitutional statute. The first district has never declared the statute under which maps are filed to be unconstitutional. It was not unconstitutional until this Court said so in 1990.

The DEPARTMENT does not claim that it is "unfair" to make it pay property owners who have been deprived of substantial economic use of their property. The DEPARTMENT asks only that property owners be required to prove the deprivation; the CENTER wants to be paid without such proof.

CONCLUSION

The decision in this case should be affirmed with a reiteration by this Court that a property owner is only entitled to a ruling that a taking has occurred when it has been proven by competent substantial evidence that the affect of the map of reservation was to deprive him/her of substantial economic use of his/her property as a whole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail on this 7th day of December, 1993 to ALAN E. DESERIO, ESQUIRE, 777 South Harbour Island Blvd., Suite 900, Tampa, Florida 33602 and JOSEPH W. FIXEL, ESQUIRE, 211 So. Gadsden Street, Tallahassee, Florida 32301.

MARIANNE A. TRUSSELL

IN THE SUPREME COURT OF FLORIDA

MICCOSUKEE VILLAGE SHOPPING
CENTER, et al.,

Petitioner,

vs. CASE NO. 82,175

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION

Respondent.

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APPENDIX TO
ANSWER BRIEF ON THE MERITS OF RESPONDENT
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

INDEX TO APPENDIX

ZIMMERMAN AND COMPANY, INC. v. SOUTHTRUST BANK. 2nd District. #92-04113. March 24, 1993. Appeal from nonfinal order of the Circuit Court for Sarasota County. Affirmed. *See Carpenter v. Benson*, 478 So. 2d 353 (Fla. 5th DCA 1985), *review denied*, 488 So. 2d 829 (Fla. 1986); *Hauser v. Dr. Chatelier's Plant Food Co.*, 350 So. 2d 548 (Fla. 2d DCA 1977).

* * *

Jury trial—Taxation—Question certified whether a taxpayer is entitled to a jury trial, pursuant to Article I, Section 22 of the Florida Constitution, in a tax refund case under Section 72.011(1), Florida Statutes, where one of the conditions of Section 72.011(3), Florida Statutes, has been met

THE PRINTING HOUSE, INC., Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF REVENUE, Respondent. 1st District. Case No. 92-2725. Opinion filed March 22, 1993. Petition for Writ of Certiorari. Lorence Jon Bielby and Keith C. Hetrick of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, Tallahassee, for petitioner. Robert A. Butterworth, Attorney General; Lisa M. Raleigh and Lealand L. McCharen, Assistant Attorneys General, Tallahassee, for respondent.

On Motion for Rehearing or Clarification, Or Alternatively Motion for Rehearing En Banc, and Motion for Certification of the Question

[Original Opinion at 18 Fla. L. Weekly D244]

(KAHN, J.) We deny Respondent's Motions for Rehearing and Rehearing En Banc and grant the Motion to Certify the Question. We certify to the Florida Supreme Court, as a question of great public importance, the following question:

IS A TAXPAYER ENTITLED TO A JURY TRIAL, PURSUANT TO ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION, IN A TAX REFUND CASE UNDER SECTION 72.011(1), FLORIDA STATUTES, WHERE ONE OF THE CONDITIONS OF SECTION 72.011(3), FLORIDA STATUTES, HAS BEEN MET?

(SMITH and MICKLE, JJ., CONCUR.)

* * *

Eminent domain—Inverse condemnation—Map of reservation—Question certified whether, [by virtue of the holding in *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622 (Fla. 1990),] all landowners with property inside the boundaries of invalidated maps of reservation under subsections 337.241(2) and (3), Florida Statutes (1987), are legally entitled [in inverse condemnation actions] to receive per se declarations of taking and jury trials to determine just compensation

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, Appellant, v. MICCOSUKEE VILLAGE SHOPPING CENTER, et al., Appellees. 1st District. Case No. 92-989. Opinion filed March 22, 1993. An appeal from the Circuit Court for Leon County. P. Kevin Davey, Judge. Thornton J. Williams, General Counsel; and Thomas F. Capshew, Assistant General Counsel, DOT, Tallahassee, for appellant. Alan E. DeSerio, of Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster and Sachs, Tampa; and Joseph W. Fixel, Tallahassee, for appellees.

(WIGGINTON, J.) We feel compelled to affirm the partial final summary judgment entered in favor of the property owners in this inverse condemnation proceeding based on the supreme court's holding in *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990), as interpreted by the Fifth District in *Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d 790 (Fla. 5th DCA 1991), *rev. denied*, 591 So.2d 183 (Fla. 1991). *See also, Tampa-Hillsborough County Expressway Authority v. A. G. W. S. Corp.*, 608 So.2d 52 (Fla. 2d DCA 1992). However, as was true with our colleagues in the Second District, we are concerned with both the practical and the legal ramifications of the *Joint Ventures* decision. *See, id.* (Campbell, A.C.J., concurring specially; Altenbernd, J., dissenting). Accordingly, we join with them in certifying to the supreme court the question posed by Judge Altenbernd's dissent, with the following modifications:

WHETHER, [BY VIRTUE OF THE HOLDING IN *JOINT VENTURES, INC. V. DEPARTMENT OF TRANSPORTATION*, 563 SO.2D 622 (FLA. 1990),] ALL LANDOWNERS WITH PROPERTY INSIDE THE BOUNDARIES OF INVALIDATED MAPS OF RESERVATION UNDER SUBSECTIONS 337.241(2) and (3), FLORIDA STATUTES (1987), ARE LEGALLY ENTITLED [IN INVERSE CONDEMNATION ACTIONS] TO RECEIVE PER SE DECLARATIONS OF TAKING AND JURY TRIALS TO DETERMINE JUST COMPENSATION.

(KAHN and MICKLE, JJ., CONCUR.)

* * *

Contracts—Real property sale—Sellers' misrepresentation or failure to disclose unobservable material defects in property about which sellers knew—Jury verdict awarding damages to buyers supported by facts and law—Error to fail to award attorney's fees to buyers—Error to award prejudgment interest from date of jury verdict rather than date of closing

MARIAN M. and ROBERT C. REID, Appellants, v. DOGULAS S. CRUCET and MICHAEL H. SHERIDAN, Appellees. 1st District. Case No. 92-211. Opinion filed March 22, 1993. An Appeal from the Circuit Court for Leon County. N. Sanders Sauls, Judge. Lorence Jon Bielby of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., and Robert C. Reid, Tallahassee, for Appellants. Sheldon Zipkin of Roth, Zipkin, Cove & Roth, North Miami Beach; Walter Dartland, Tallahassee; Joseph Boyd, Jr. of Boyd & Branch, P.A., Tallahassee, for Appellees.

(PER CURIAM.) The Reids, buyers of a residential home, brought this action against the sellers for damages which resulted when the sellers misrepresented or failed to disclose unobservable material defects in the property, about which they knew, and the buyers relied to their detriment upon these representations. The jury's verdict awarding the buyers $30,000 damages is supported by the facts and the law. *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985). However, the trial court erred in failing to award the Reids their attorney's fees and in awarding prejudgment interest from the date of the jury verdict rather than the date of closing. *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d DCA 1989); and *Thomas v. Toth*, 539 So. 2d 8 (Fla. 2d DCA 1989).

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion. (ERVIN, SMITH AND BARFIELD, JJ., CONCUR.)

* * *

Criminal law—Juveniles—Sentencing—Restitution—No causal relationship between victim's damages and defendant's conviction of leaving scene of accident resulting in injury to another person—Error to direct defendant's mother to pay defendant's restitution in event that defendant failed to pay—Error to assess attorney-fee lien against defendant's mother for services rendered to her son by court-appointed counsel without affording mother notice and opportunity to contest amount of lien

IN THE INTEREST OF L.A.D., a child, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-2657. Opinion filed March 22, 1993. An Appeal from the Circuit Court for Duval County. Brad Stetson, Judge. Deborah A. Schroth of Jacksonville Legal Aid, Inc., Jacksonville, for Appellant. Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

(ERVIN, J.) In this appeal from a delinquency adjudication, appellant, the mother of L.A.D.,[1] challenges an order directing her to pay restitution in the event that L.A.D. failed to make such payment, and in ordering her to pay attorney's fees for services rendered to her son by court-appointed counsel. Upon review of court-ordered supplemental briefs, we conclude that imposition of restitution upon the child, or upon the mother if the child failed to pay, was invalid, and that the error in directing same is fundamental. We therefore vacate the restitution portion of the order as it pertains to appellant. As to the attorney-fee issue, because the mother did not receive prior notice informing her she could be assessed for her son's attorney-fee obligation, we reverse and remand for further proceedings consistent with this opinion.

Following L.A.D.'s plea of guilty to the offense of leaving the scene of an accident resulting in an injury to another person, the court determined that L.A.D. had committed a delinquent act and

claimant, because his wage loss was continuously paid at the maximum compensation rate of $344.00.

[3] There is likewise no competent substantial evidence from which one might conclude that the carrier unduly delayed its decision to accept claimant as permanently and totally disabled. No doctor ever testified that claimant was unable to work. Claimant was not found to have reached maximum medical improvement from subsequent injuries which had increased his permanent impairment rating significantly, and had been causally related to the initial injury, until the end of March 1991. The carrier had been providing rehabilitation services until the middle of April 1991, when the rehabilitation specialist opined that claimant had not been successful in finding employment because of his "age, physical restrictions, and his [sic] depressed labor market." All wage-loss claims filed, with the exception of two in December 1989, had been paid by the carrier. Claimant filed his claim for permanent and total disability benefits in May 1991, and the carrier accepted claimant as permanently and totally disabled in June.

[4] The only finding of bad faith which is supported by competent substantial evidence is that regarding denial of wage-loss benefits for the weeks of December 10 and 24, 1989. (Claimant testified that the carrier never instructed him as to his job-search responsibilities.) The benefits secured by claimant's attorney for those two weeks of wage loss totalled $688.00.

[5, 6] We reverse the award of fees to claimant's attorney based upon our conclusion that three of the four discrete instances of bad faith found by the judge of compensation claims are not supported by competent substantial evidence. An award of attorney fees pursuant to section 440.34(3)(b), Florida Statutes (1987), must be based upon the benefits secured and the time reasonably spent in obtaining them. Moreover, a finding of entitlement to bad-faith attorney fees in connection with the handling of one claim does not, in the absence of bad faith in the handling of a later claim, entitle one to a fee with regard to the later claim as well. *See e.g., Wackenhut Corp. v. Schisler,* 606 So.2d 1250 (Fla. 1st DCA 1992). Accordingly, we remand with directions that the judge of compensation claims award claimant's attorney a reasonable fee for his services in obtaining for claimant the $688.00 in wage-loss benefits for the weeks of December 10 and 24, 1989.

REVERSED and REMANDED, with directions.

SMITH, KAHN and WEBSTER, JJ., concur.

STATE of Florida, DEPARTMENT OF TRANSPORTATION, Appellant,

v.

MICCOSUKEE VILLAGE SHOPPING CENTER, et al., Appellees.

No. 92-989.

District Court of Appeal of Florida, First District.

July 7, 1993.

Inverse condemnation proceeding was brought involving issue of whether mere inclusion of landowners' property within boundaries of map of reservation filed by Department of Transportation amounted to per se taking. The Circuit Court, Leon County, P. Kevin Davey, J., entered partial summary judgment in favor of landowners, and appeal was taken. The District Court of Appeal held that: (1) regulatory enactment declared unconstitutional as invalid exercise of police power does not necessarily mean a taking of regulated property has occurred and accordingly, traditional takings analysis must still be applied to each affected parcel, and (2) material issue of fact as to whether taking of landowners'

property occurred precluded entry of summary judgment.

Reversed and remanded.

1. Eminent Domain ⇐2(1)

Regulatory enactment declared unconstitutional as invalid exercise of police power does not necessarily mean a "taking" of regulated property has occurred and accordingly, traditional "takings" analysis must still be applied to each affected parcel.

2. Judgment ⇐181(15.1)

Material issue of fact as to whether "taking" of landowners' property occurred by virtue of fact that their property was included within boundaries of map of reservation filed by Department of Transportation precluded summary judgment for landowners in inverse condemnation proceeding. F.S.1991, § 337.241(1).

Thornton J. Williams, Gen. Counsel, and Thomas F. Capshew, Asst. Gen. Counsel, DOT, Tallahassee, for appellant.

Alan E. DeSerio, Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster and Sachs, Tampa, and Joseph W. Fixel, Tallahassee, for appellees.

ON MOTION FOR REHEARING

PER CURIAM.

We grant the Department of Transportation's Motion for Rehearing, withdraw our previous opinion, and substitute the following opinion therefor.

This case originated below as an inverse condemnation proceeding and involves the issue of whether the mere inclusion of appellees' property within the boundaries of the map of reservation filed by the Department of Transportation pursuant to subsection 337.241(1), Florida Statutes (1987), amounted to a per se taking under the supreme court's decision in *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622 (Fla.1990). The trial court granted a partial final summary judgment on that basis in favor of appellees, expressly relying on the Fifth District's interpretation of *Joint Ventures* as set forth in *Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So.2d 790 (Fla. 5th DCA 1991).

[1] However, very recently, the Fifth District reconsidered *Agrigrowth*, and in an *en banc* opinion, expressly receded from its decision therein. *See Department of Transportation v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA 1993). Upon careful review of that court's majority and concurring opinions in *Weisenfeld*, we adopt the view taken by Judge Griffin in her specially concurring opinion. Judge Griffin's exposition carefully defined "[t]he relationship between the invalidity of land-use regulation that interferes with property rights in violation of due process and land use regulation that effects a 'taking' ..." *Id.* at 1080. "[A] regulatory enactment declared unconstitutional as an invalid exercise of police power does not necessarily mean a 'taking' of the regulated property has occurred." *Id.* Accordingly, "[a] traditional 'takings' analysis must still be applied to each affected parcel." *Id.*[1]

[2] Because the trial court granted appellees' motion based on an erroneous interpretation of the law, and because we discern a genuine issue of material fact on the question of whether a taking of appellees' property occurred, the partial final summary judgment entered in favor of appellees is hereby REVERSED, and the cause is REMANDED for further proceedings.

JOANOS, KAHN and MICKLE, JJ., concur.

1. In adopting such an approach, we recognize that our opinion herein expressly conflicts with the opinion of the Second District in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 608 So.2d 52 (Fla. 2d DCA 1992), *review granted*, 621 So.2d 433 (Fla.1993).